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No. 09-_____

In the Supreme Court of the United States

JOSE ANAYA-AGUILAR,
Petitioner

v.

ERIC H. HOLDER
Attorney General of the United States,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Seventh Circuit correctly hold in this case relying on *Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008), *cert.* granted *sub nom Kucana v. Holder*, --- S.Ct. ---, 2009 WL 1107926 (Apr. 27, 2009) that the jurisdiction-stripping provision of the Immigration and Nationality Act (INA), 8 U.S.C. §1252(a)(2)(B)(ii), which bars judicial review of "any . . . decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General," precludes judicial review of agency decisions on motions to reopen?

II. Does 8 U.S.C., §1252(a)(2)(D), which directs that "[n]othing in [the jurisdiction-stripping provision] shall be construed as precluding [judicial] review of constitutional claims or questions of law, as interpreted by the Seventh Circuit as limited to pure questions of law constitute a further restriction on judicial review?

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OPINIONS BELOW

On November 8, 2007, a petition for review was filed in the Seventh Circuit, *Jose Anaya-Aguilar v. Michael Mukasey*, Case Nos. 07-3701 and 08-1367. On November 19, 2008, the Seventh Circuit in an unpublished and non-precedential decision denied the petition for review for lack of jurisdiction under 8 U.S.C. §1252(a)(2)(B)(ii). Appx. 3a-4a.

On December 23, 2008, a petition for rehearing was filed in the Seventh Circuit, *Jose Anaya-Aguilar v. Michael Mukasey*, Case No. 08-1367. On February 23, 2009, the Court denied rehearing in a memorandum order. Appx. 2a

JURISDICTIONAL STATEMENT

The judgment of the court of appeals for the Seventh Circuit denying the petition for rehearing was entered on February 23, 2009. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Section 1252(a) of the Immigration Act, as amended, provides in pertinent part:

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1) of this title

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review-

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or

operation of an order of removal pursuant to section 1225 (b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1) (B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. §1252(a)(2)(D) states:

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. §1252(a)(5) states:

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

8 U.S.C. §1252(b)(6) states:

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

8 U.S.C. §1252(b)(9) states:

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 U.S.C. §1229a provides in pertinent part:

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

8 U.S.C. §1229a(c)(6) states in pertinent part:

(6) Motions to reconsider

(A) In general

The alien may file one motion to reconsider a decision that the alien is removable from the United States.

(B) Deadline

The motion must be filed within 30 days of the date of entry of a final administrative order of removal.

(C) Contents

The motion shall specify the errors of law or fact in the previous order and shall be supported by pertinent authority.

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

8 C.F.R. §1003.2 states in pertinent part:

(a) General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

(b) Motion to reconsider.

(1) A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority. A motion to reconsider a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed with the Board, or that is filed subsequent to the filing with the Board of an appeal from the decision sought to be reconsidered, may be deemed a motion to remand the decision for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with the appeal to the Board.

(2) A motion to reconsider a decision must be filed with the Board within 30 days after the mailing of the Board decision or on or before July 31, 1996, whichever is

later. A party may file only one motion to reconsider any given decision and may not seek reconsideration of a decision denying a previous motion to reconsider. In removal proceedings pursuant to section 240 of the Act, an alien may file only one motion to reconsider a decision that the alien is removable from the United States.

(3) A motion to reconsider based solely on an argument that the case should not have been affirmed without opinion by a single Board Member, or by a three-Member panel, is barred.

(c) Motion to reopen.

(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c))

may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

STATEMENT

This case concerns whether, as the Seventh Circuit held in this case relying on *Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008), *cert.* granted *sub nom Kucana v. Holder*, --- S.Ct. ----, 2009 WL 1107926 (Apr. 27, 2009),the jurisdiction-stripping provision of the Immigration and Nationality Act (INA), 8 U.S.C. §1252(a)(2)(B)(ii) which bars judicial review of decisions "the authority for which is specified under this subchapter to be in the discretion of the Attorney General" applies to judicial review of the Board of Immigration Appeals ("BIA") denials of motions to reopen and reconsider. Appx. 3a-4a. In the decision below, the Seventh Circuit relied on its precedent in *Kucana* to conclude that §1252(a)(2)(B)(ii) deprived it of jurisdiction over the BIA decisions denying petitioner's motions to reopen and to reconsider. *See Anaya-Aguilar v. Mukasey*, 302 Fed. Appx. 481, 483 (7th Cir. Dec. 9, 2008). Appx. 3a-4a. This Court has granted certiorari in *Kucana* to resolve the split between the Seventh Circuit and ten other circuits on the question whether §1252(a)(2)(B)(ii) deprives the Courts of Appeals of jurisdiction to review BIA decisions denying such motions. As this Court has granted certiorari to review precisely the question raised in petitioner's case it should grant certiorari in this case and hold for *Kucana*.

A serious split of authority exists between the Seventh Circuit and other circuit courts as to the scope of the jurisdictional provisions of the Real ID Act, specifically the provisions of 8 U.S.C. §1252(a)(2)(B), that undermines the uniformity between various circuit courts as to federal court jurisdiction and aliens' access to judicial review. Petitioner asks this court to resolve whether 8 U.S.C.

§1252(a)(2)(B)(ii) can be applied to any discretionary decision, including decisions not specified by statute as discretionary, so as to deprive an alien of judicial review.

In contrast to the majority of circuit courts, the Seventh Circuit has concluded that it lacks jurisdiction to review a decision of the BIA declining to reopen a removal hearing because it is a discretionary decision under the Attorney General's regulations governing motions to reopen, 8 C.F.R. §1003.2. The Seventh Circuit has further restricted judicial review by interpreting 8 U.S.C. §1252(a)(2)(D) to allow review only of pure questions of law and constitutional claims, excluding questions of application of law to undisputed or adjudicated facts. If habeas jurisdiction is not available, the Seventh Circuit's interpretation of the judicial preclusion provisions of the REAL ID Act deprives persons such as the Petitioner of any judicial review and is unconstitutional.

A. Statutory Framework:

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996), which had, as its purpose "to further clarify and streamline . . . judicial review of deportation and exclusion orders." S. Rep. No. 249, 104th Cong., 2d Sess. 14 (1996). Section 1252(a) of IIRIRA specified that judicial review of a final order of removal is governed by Chapter 158, Title 28 (Hobbs Act). IIRIRA repealed the judicial review provisions of the Immigration and Nationality Act of 1961, 8 U.S.C. §1105a, *et seq.*, including the provisions allowing habeas corpus relief for aliens under exclusion orders or aliens under deportation orders who were in custody.

Section 1252(a)(2)(C) barred courts from reviewing any removal order issued against an alien who had

committed specified offenses, without regard to the date of their commission. Another jurisdiction-stripping provision, 8 U.S.C. §1252(a)(2)(B)(i), barred judicial review of enumerated applications for discretionary relief, and 8 U.S.C. §1252(a)(2)(B)(ii) barred judicial review of any other decision ". . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General." Section 1252(b)(9) of 8 U.S.C. consolidates all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States in a single removal proceeding.

IIRIRA eliminated the old remedy of suspension of deportation, substituting the remedy of cancellation of removal for certain permanent residents and for certain nonpermanent residents. 8 U.S.C. §§1229b(a) and (b). Petitioner, had applied for such relief and needed to establish (1) physical presence in the United States for a continuous period of ten years preceding the date of such application; (2) good moral character; (3) a lack of a conviction for specified criminal offenses; and (4) exceptional and extremely unusual hardship to his two minor children who are United States citizens.

Prior to IIRIRA, authority over motions to reopen and reconsider was conferred by regulation, 8 C.F.R. §1003.2, that enabled aliens to present new evidence previously not available or discoverable or to file new applications for relief could not have been presented in the earlier proceeding. The regulation specified that decisions regarding such motions were discretionary.

IIRIRA created a one-time statutory right to petition to reopen within 90 days of the final administrative order and permitted one motion to reconsider to be filed within 30 days of the last administrative order. 8 U.S.C.§§1229a(c)(7)(A)-(B). Judicial review of the denial of such motions was provided

by 8 U.S.C. §1252(b)(6) consolidating review of such motions with review of a final removal order.

In deciding whether AEDPA and IIRIRA foreclosed habeas corpus relief by implication, the Supreme Court in *INS v. St. Cyr*, 533 U.S. 289, 314 (2001), concluded that neither §401(e) of AEDPA, §1252(a)(1), §1252(a)(2)(C) nor §1252(b)(9) of IIRIRA prohibited habeas corpus review because the acts did not contain a clear statement of Congress' intention to bar habeas corpus relief under 28 U.S.C. §2241. The Supreme Court concluded that, if the statutes could be interpreted to bar habeas corpus, it would create a serious constitutional question because the Suspension Clause, which protects the privilege of the habeas corpus writ, unquestionably requires some judicial review in deportation cases, citing, *Heikkila v. Barber*, 345 U.S. 229, 235 (1953). 533 U.S. at 300. The Court noted that historically, habeas corpus addressed questions of law in the context of discretionary relief in immigration cases, as well as the application or interpretation of statutes, citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499 (1954); *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 77, 77 S.Ct. 618 (1957) and *Jay v. Boyd*, 351 U.S. 345, 354, 76 S. Ct. 919 (1956)("Courts may interfere only where there has been a clear abuse of discretion or a clear failure to exercise discretion.") 533 U.S. at 305, 307-8.

In 2005, Congress amended IIRIRA by enacting the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, which added to 8 U.S.C. §§1252(a)(2)(A) and (2)(B), the following language:

> Notwithstanding any other provision of law (statutory or nonstatutory) including section 2241 of title 28, United States Code, or any other habeas corpus provisions and sections 1362 and 1651 of such title, no court shall

have jurisdiction to review . . ."

The same language appears in 8 U.S.C. §1252(a)(4), §1252 (a)(5) and §1252(b)(9). A new section, 8 U.S.C. §1252(a)(2) (D) provides that "[n]othing in . . . any . . . provision of this chapter . . . which limits or eliminates judicial review shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review."

B. Proceedings Below:

Jose Anaya-Aguilar was born in the town of Huetzuco, Guerrero, Mexico, pop. 4,500, in the State of Guerrero, Mexico on January 14, 1969. Appx. 10a - 11a, 28a His father was a farmer; his mother was a homemaker. Appx. 33a-35a. One of 12 siblings, he did not attend school in Mexico because his family was too poor to send him. Appx. 42a. At nineteen years of age, petitioner entered the United States without inspection and he has lived in the United States for more than half his life. Appx. 7. Removal proceedings were instituted in October 2003 and he retained attorney Raul Villasuso to represent him. Appx. 15a. Villasuso filed an application for cancellation of removal supported only by petitioner's marriage certificate and the birth-certificate of his oldest son, Jose. Appx. 21a

On the day of the merits hearing and contrary to the rules of practice of the Immigration Court that required submissions to be made 15 days in advance of the hearing, Villasuso presented a few more documents to establish continuous physical presence: (1) a letter confirming Petitioner's employment with Rozoni Lawn Service from April 15, 1988 to May 27, 1988; (2) some pay stubs dating from October 1990 to 2006, (5) a vehicle sales tax return submitted on 05/24/1995; (6) a receipt for car repairs dated 06/03/96, (7) a W-2 statement for 1997; (8) a

birth certificate of a second son, Daniel, born on February 8, 2003 in Skokie, Illinois, and (9) petitioner's marriage certificate to Rosa Colon. The Immigration Judge noted that the documentation presented was "sketchy" Appx. 34a.

The August 27, 2004, hearing in petitioner's case on the merits of his application was brief, as evidenced by 19 pages of transcript. Appx. 31a-50a. In an attempt to establish hardship, Villasuso asked his client: "What would happen with your child if you were removed to Mexico?" Appx. 39a. Petitioner replied "He would suffer a great deal because I would not know how to do it." *Id.* His wife and children, he testified, could not live with him in Mexico because he did not have a house there and could not find a job in Mexico. Appx. 40a. As a self- employed repair person in the United States, he earned $400-$500 per week, whereas in Mexico he would earn $50 a week. Appx. 41a.

The immigration judge denied the application for failure to meet the standard of hardship for cancellation of removal and specifically noted that there were no medical issues. Appx. 48a-49a. She granted Petitioner voluntary departure. Id. Villasuso reserved appeal and filed a notice of appeal to the Board. Petitioner posted a $500.00 voluntary departure bond. Appx. 50a. On June 2, 2005, the BIA affirmed the decision of the Immigration judge and entered an order extending voluntary departure for an additional 30 days. Villasuso did not notify his client that the BIA had dismissed his appeal and that he had 30 days to leave the United States voluntarily or be subject to an order of removal.

Over a period of two years, petitioner vainly sought information from his attorney about the status of his case. When he did make contact with the attorney, he was always advised that his case was pending. Appx. 12a. When petitioner received a notice from the office of Immigration and Customs Enforcement, dated March 30,

2007, that the $500.00 bond he posted to guarantee his voluntary departure had been forfeited because he failed to depart, he faxed the notice to Villasuso, asking him what the paper meant and what he was to do. Appx 11a-12a. Villasuso again lied to petitioner, stating that his case had not yet been decided by the Board. Id. At that point, petitioner demanded a copy of his immigration file from the attorney in order to consult with other counsel. On May 7, 2007, he finally received a copy of his immigration file, but it did not contain a copy of the Board's final order.

On May 21, 2007, petitioner filed a motion to reopen the removal proceeding, alleging that he had been the victim of ineffective assistance of counsel and that his former attorney had failed to properly submit evidence as to his good moral character and extraordinary hardship. Appx. 10a-18a. He alleged that his former attorney had concealed the fact that the BIA had entered a final order on June 5, 2005, dismissing his appeal and granting him the privilege of voluntary departure within 30 days of its order. Appx. 17a. By the time he understood what had happened in his case, he had lost the opportunity to depart voluntarily; he had forfeited the voluntary departure bond that he posted to guarantee his departure; he was under an order of removal that barred him from reentering the United States for 10 years; he had lost the opportunity to seek judicial review and/or to file a timely motion to reopen within the 90-day period authorized by law to present new evidence.

To show how he was prejudiced by his former attorney's preparation of the original application for cancellation of removal, petitioner presented an amended application for cancellation of removal, supported by 163 pages of documents, consisting of medical records relating to petitioner and his two U.S. citizen sons showing that in 2001 petitioner was treated for glaucoma and had lost

vision in one eye., Appx. 19a; that beginning in infancy, his sons had experienced bouts of asthma, bronchitis and pneumonia; and that one son was deathly allergic to mosquito bites. Appx. 20a. His medical condition was relevant to demonstrate that he would not be able to find adequate employment in Mexico because of his visual disabilities and he would not be able to support his sons. He submitted articles describing the environmental conditions in Mexico that would adversely affect the respiratory problems that he and his sons frequently experience. To establish good moral character, he submitted letters of appreciation from persons for whom he had provided good services. Appx. 21a.

The BIA denied the motion, stating that petitioner had not demonstrated due diligence in discovering the facts of his immigration status and the ineffective assistance of counsel, despite uncontested facts showing that petitioner could have established threshold eligibility for that relief but for his lawyer's incompetence. Appx. 8a -9a. The Board concluded that it could not decide the issue of due diligence because a page of the petitioner's supporting affidavit was missing. Appx. 10a-11a. It concluded that the attorney/client relationship between petitioner and Villasuso began with his appeal to the BIA, contrary to the evidence that Villasuso represented petitioner from the beginning of the immigration court proceedings. *Id.*

Petitioner filed a motion to reconsider to correct the BIA's mistake as to the date of Villasuso's representation and he resubmitted his supporting affidavit with the missing page. The BIA denied reconsideration, characterizing the motion as a motion to reopen, which it held was time and numerically barred. Appx. 6a - 7a

REASONS FOR GRANTING THE PETITION

This case concerns whether, as the Seventh Circuit held in *Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008), *cert.* granted *sub nom* Kucana v. Holder, --- S.Ct. ----, 2009 WL 1107926 (Apr. 27, 2009), the jurisdiction-stripping provision of the Immigration and Nationality Act (INA), 8 U.S.C. §1252(a)(2)(B)(ii), which bars judicial review of decisions . . . "the authority for which is specified under this subchapter to be in the discretion of the Attorney General. . ." also precludes judicial review of agency decisions on motions to reopen. In the decision below, the Seventh Circuit relied on *Kucana* to conclude that §1252(a)(2)(B)(ii) deprived it of jurisdiction over petitioner's motion to reopen and motion to reconsider because they were discretionary decisions according the Attorney General's regulation, 8 C.F.R. §1003.2(c). *See Anaya-Aguilar v. Mukasey*, 302 Fed. Appx. 481, 483 (7th Cir. Dec. 9, 2008). This Court has granted certiorari in *Kucana* to resolve the split between the Seventh Circuit and ten other circuits on the question whether §1252(a)(2)(B)(ii) deprives the Courts of Appeals of jurisdiction to review BIA decisions denying motions to reopen and reconsider. As this Court has granted certiorari in *Kucana*, and the same issue is raised in petitioner's case, it should grant certiorari in this.

I.

THE SEVENTH CIRCUIT'S INTERPRETATION OF 8 U.S.C. §1252(a)(2)(B)(ii) AS PRECLUDING JURISDICTION TO REVIEW DENIALS OF MOTIONS TO REOPEN IS INCORRECT.

In a series of cases, the Seventh Circuit has interpreted the provisions of 8 U.S.C. §1252(a)(2)(B)(ii) as depriving it of jurisdiction to review an immigration judge's denial of a continuance because the statutory authority for such discretion derives from 8 U.S.C. §1229a(a)(1) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."), *Ali v. Gonzales*, 502 F.3d 659, 664 (7th Cir. 2007), cert. denied, 128 S. Ct. 1870 (2008), relying on *Leguizamo-Medina v. Gonzales*, 493 F.3d 772, 775 (7th Cir. 2007) which, in turn, cited *Powerex Corp. v. Reliant Energy Servs.*, 547 U.S. 1067, 126 S. Ct. 1826 (2006) for the proposition that when a decision is unreviewable, any opinion one way or the other on the propriety of the steps that led to that decision would be an advisory opinion. See *Singh v. Dept. of Homeland Security*, 517 F.3d 638, 647, n .11 (2d Cir. 2008), specifically rejecting the reasoning of *Leguizamo-Medina*.

In effect, the Seventh Circuit decided it lacked the power to review any discretionary decision that precedes a removal order. *Leguizamo-Medina v. Gonzales*, *supra*. Building on that precedent, the Seventh Circuit applied its interpretation of 8 U.S.C. §1252(a)(2)(B)(ii) to bar review of the BIA's denials of motions to reopen. *Kucana v. Mukasey*, *supra*; and *Huang v. Mukasey*, 534 F.3d 618 (7th Cir. 2008), finding the authority for characterizing such decisions as discretionary in the Attorney General's regulations, 8 C.F.R. §1003.2, governing motions to reopen and motions to reconsider. In *Kucana*, there were strong

dissenting opinions from five members of the court. 553 F.3d 539-42.

A majority of circuit courts have come to the opposite conclusion by construing §1252(a)(2)(B)(ii) according to its plain language requiring that such discretion must be specified in the statute, i.e., §§1151-1378, and therefore have reviewed denials of motions to reopen and decisions on continuances under an abuse of discretion standard. *Alsamhouri v. Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007); *Zafar v. U.S. Att'y Gen.*, 461 F.3d 1357, 1360-62 (11th Cir. 2006); *Khan v. Att'y Gen. of the U.S.*, 448 F.3d 226, 231-32 (3d Cir. 2006); *Ahmed v. Gonzales*, 447 F.3d 433, 436-37 (5th Cir. 2006); *Sanusi v. Gonzales*, 445 F.3d 193, 198-99 (2d Cir. 2006); *Abu-Khaliel v. Gonzales*, 436 F.3d 627, 632-34 (6th Cir. 2006); *Alaka v. Att'y Gen.*, 456 F.3d 88, 97 (3d Cir. 2006)("[t]here are no less than thirty-two additional provisions in the very sub chapter of the INA referenced by 8 U.S.C. §1252(a)(2)(B)(ii) that make explicit the grant of 'discretion' to the Attorney General or the Secretary of Homeland Security."); *Mozano-Garcia v. Gonzales*, 413 F.3d 462 (5th Cir. 2005).

While the Tenth Circuit had concluded that it lacked jurisdiction to review an immigration judge's denial of a continuance, *Yerkovich v. Ashcroft*, 381 F.3d 990 (10th Cir. 2004), it also decided that it could review decisions of the BIA denying motions to reopen under an abuse of discretion standard. *Kucekar v. Gonzales*, 500 F.3d 1081 (10th Cir. 2007). The Eighth Circuit, having previously concluded that it lacked jurisdiction over discretionary decisions, *Onyinkwa v.Ashcroft*, 376 F.3d 797 (8th Cir. 2004), has reversed course and interpreted the statute according to its plain language. *Miah v. Mukasey*, 519 F.3d 784, 789 (8th Cir. 2008) ("The statute applies to decisions "the authority for which is specified under this subchapter to be in the discretion of the Attorney General . . . The

discretion to grant or deny motions to reopen or reconsider is conferred by the Attorney General's regulations, not by statute. See 8 C.F.R. §1003.2. Thus, we have continued our long-standing practice of reviewing the denial of motions to reopen for abuse of the BIA's discretion.").

The Seventh Circuit's interpretation of what is discretionary and therefore, not subject to review, runs against the strong presumption favoring judicial review of administrative action. *INS v. St. Cyr*, 533 U.S. at 298; *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 120 S.Ct. 1084 (2000). Through the actions of his former counsel, petitioner has never had the opportunity to obtain judicial review in the Seventh Circuit. Under like circumstances in another circuit, he could have obtained judicial review.

II.

THE SEVENTH CIRCUIT INCORRECTLY INTERPRETS 8 U.S.C. §1252(a)(2)(D) AS CONFERRING JURISDICTION TO REVIEW ONLY PURE QUESTIONS OF LAW OR CONSTITUTIONAL CLAIMS AND IS A FURTHER RESTRICTION ON JUDICIAL REVIEW

In this case, the court concluded that petitioner did not raise any constitutional claim or question of law that merited judicial review. The Seventh Circuit's declaration that it will review only "pure" questions of law and constitutional claims amounts to a further limitation on judicial review. As this Court noted in *INS v. St. Cyr*, 533 U.S. at 289 " . . . the scope of habeas review available in §2241 petitions by aliens challenging removal orders included constitutional issues and errors of law, including statutory interpretations and application of law to undisputed facts or adjudicated facts . . . ."

CONCLUSION

As this Court has granted certiorari in *Kucana v. Mukasey*, *supra*, to review precisely the question raised in petitioner's case it should grant certiorari in this case in light of *Kucana*.

Respectfully submitted,

_____

MARY L. SFASCIOTTI
Attorney for Jose Anaya-Aguilar

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Supreme Court, U.S.
FILED

081484 MAY 18 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

No. 09-_____

In the Supreme Court of the United States

JOSE ANAYA-AGUILAR,
Petitioner

v.

ERIC H. HOLDER,
Attorney General of the United States,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

PETITIONER'S APPENDIX

MARY L. SFASCIOTTI
LAW OFFICES OF MARY L. SFASCIOTTI, PC
79 West Monroe Street, Suite 1215
Chicago, Illinois 60603
(312) 726-3278

Counsel for Petitioner:
Jose Anaya-Aguilar

May 3, 2009

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 23, 2009

Before

DANIEL A. MANION, *Circuit Judge*
MICHAEL S. KANNE, *Circuit Judge*
TERENCE T. EVANS, *Circuit Judge*

Nos. 07-3701 & 08-1367

JOSE ANAYA-AGUILAR,
Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General of the
United States,
Respondent.

Petitions for Review of
an Order of the Board of
Immigration Appeals.
No. A29-665-793

O R D E R

On December 23, 2008, the petitioner filed a petition for rehearing and petition for rehearing en banc. All the judges on the original panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc. The petitions for rehearing and rehearing en banc are therefore **DENIED.**

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued November 19, 2008
Decided December 9, 2008

Before
Daniel A. Manion, *Circuit Judge*
Michael S. Kanne, *Circuit Judge*
Terence T. Evans, *Circuit Judge*

Nos. -07-3701 & 08-1367

Jose Anaya-Aguilar,
Petitioner,

v.

Michael B. Mukasey,
Attorney General of the
United States,
Respondent.

Petition for Review of
Orders of the Board of
Immigration Appeals.
No. A29-665-793

O R D E R

Jose Anaya-Aguilar, a citizen of Mexico, petitions for review of two orders by the Board of Immigration Appeals denying motions to reopen and reconsider his case. The question for us is whether we have jurisdiction to consider his petition.

Anaya entered the United States without authorization on an unknown date. An immigration judge found him removable, and in 2005 the BIA affirmed that decision.

Two years later Anaya moved to reopen his case claiming that his counsel's performance in the earlier proceedings was deficient. The BIA observed that the 90-day deadline for filing a motion to reopen had long passed, *see* 8 U.S.C. §1229a(c)(7)(C)(I); 8 C.F.R. §1003.2(c)(2), and that Anaya had neither asserted that the limitations period was equitably tolled nor had he presented facts showing that he exercised due diligence in submitting his motion. The BIA thus denied the motion without reaching the merits of Anaya's ineffective-assistance claim. Anaya then asked the BIA to reconsider its denial of his motion to reopen, but the BIA found no reason to overturn its earlier decision. Anaya petitions for review of both rulings.

Discretionary decisions by immigration authorities are immune from judicial review unless they raise "constitutional claims or questions of law." *See* 8 U.S.C. §1252(a)(B)(ii), (a)(2)(D); *Kucana v. Mukasey*, 533 F.3d 534 (7th Cir. 2008). Motions to reopen and to reconsider are within the discretion of the BIA, 8 C.F.R. §1003.2(a), and so are unreviewable unless they present constitutional or legal questions. *Johnson v. Mukasey*, 2008 WL 4414599, at *1 (7th Cir. Oct. 1, 2008); *Kucana*, 533 F.3d at 536.

Aware of this, Anaya suggests that his petitions involve three legal issues. He first submits that his motion to reopen encompassed a question of law because its very premise was that his lawyer in the removal proceedings was incompetent. But the premise of the motion is irrelevant because the BIA never reached the merits; the BIA concluded that the motion to reopen was unjustifiably late and decided no more. In any event, even if the BIA had decided Anaya's motion to reopen on the merits, we still would not have jurisdiction to review the BIA's ruling because there is no constitutional, statutory, or administrative right to effective counsel in immigration proceedings. *See Jezierski v. Mukasey*, 543 F.3d 886, 888-891 (7th Cir. 2008).

Anaya next claims that the BIA ignored the evidence

that he put forth to show that he diligently pursued his motion to reopen. We need not decide whether the BIA truly ignored his evidence because due diligence is a factual determination, *see Patel v. Gonzales*, 442 F.3d 1011, 1016 (7th Cir. 2006), and not a question of law within the §1252(a)(2)(D) exception.

Finally, Anaya maintains that the BIA misconstrued his motion to reconsider as a second motion to reopen and denied it on that basis. The purported mischaracterization of the motion, says Anaya, is a question of law. Actually, because an agency has discretion to implement its own regulations, *see Krougliak v. I.N.S.*, 289 F.3d 457, 460 (7th Cir. 2002), the classification of Anaya's motion lay within the BIA's discretion, *Iturribarria v. I.N.S.*, 321 F.3d 889, 894095 (9th Cir. 2003), and we do not have jurisdiction to review it. Either way, Anaya mischaracterizes the facts– the BIA denied his motion to reconsider and only then observed that, had it been a motion to reopen, it would have been number-barred as well.

Anaya's petitions do not raise any question of law or constitutional issue. Accordingly, we DISMISS both for lack of jurisdiction.

U.S. Department of Justice
Executive Office for
Immigration Review
Falls Church, Virginia 22041

Decision of the Board
of Immigration
Appeals

File: A29 665 793 - Chicago, IL Date: January 18, 2008

In re: JOSE ANAYA-AGUILAR

IN REMOVAL
PROCEEDINGS
MOTION

ON BEHALF OF RESPONDENT: Mary L. Sfasciotti, Esquire

ON BEHALF OF DHS: David Williams
Assistant Chief
Counsel

APPLICATION: Reconsideration
ORDER:

PER CURIAM: This case was last before the Board on October 31, 2007, when we denied the respondent's motion to reopen. In that decision we denied the ineffective assistance of counsel claim because the motion was untimely and we further found that the respondent failed to demonstrate that he exercised due diligence for purposes of equitable tolling. The respondent has now filed what he has characterized as a motion to reconsider.

We find no error in our prior decision. The evidence submitted by the respondent with his motion, indicating that for two years following the 2004 hearing he called Mr. Villasuso, is insufficient to establish that he exercised due diligence for the purposes of equitable tolling. *See Patel v. Gonzales,* 442 F.3d 1011, 10156 (7th Cir. 2006)(with an untimely motion, an alien must demonstrate that his situation warrants equitable tolling of the time limits, and equitable tolling in turn requires a showing of due

diligence in pursuing the motion to reopen from the time the alien is cognizant of the possibility that he was injured).

The respondent also proffers with the motion to reconsider, evidence not provided with the motion to reopen. When an alien presents new evidence as part of a motion to reconsider, as the respondent did here, we have held that the motion should be construed as one to reopen. *See Matter of Cerna*, 20 I& N Dec. 399, 400 (BIA 1991); *see also Mungongo v. Gonzales*, 479 F.3d 531, 535 (7th Cir. 2007) ("New evidence may not be submitted in a motion to reconsider."). Because the respondent has submitted new evidence he wishes to have considered, his motion is more properly characterized as a motion to reopen, and as such it is number-barred. *See* 8 C.F.R. §1003.2©)(2).

Accordingly, the motion is denied.

/s/ John Guendelsohn
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, Virginia 22041

File: A29 665 793 - Chicago, IL Date: Oct 31, 2007

In re:
JOSE ANAYA-AGUILAR IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Mary L. Sfasciotti, Esquire

ON BEHALF OF DHS: David Williams
Assistant Chief Counsel

APPLICATION: Reopening

This case was last before us on June 2, 2005, when we affirmed, without opinion, the Immigration Judge's August 27, 2004, decision denying the respondent's application for cancellation of removal under section 240A (b) of the Immigration and Nationality Act, 8 U.S.C. §1229b(b), because the respondent failed to establish the requisite hardship to his qualifying family members.

On May 21, 2007, the respondent filed a motion to reopen these removal proceedings based, in part, on a claim of ineffective assistance of counsel. The motion was not filed within the statutory and regulatory 90-day time limit for filing a motion to reopen. *See* section 240(c)(7)(C)(I) of the Act, 8 U.S.C. §1229a(c)(7)(C)(I) and 8 C.F.R. §1003.2(C)(2). This motion was filed nearly two years after the issuance of the June 2, 2005, final administrative order in this case.

Although the United States Court of Appeals for the Seventh Circuit, the jurisdiction wherein this case arises, permits equitable tolling of the 90-day motions deadline, the respondent has not argued that his case warrants equitable tolling. *See Patel v. Gonzales*, 442 F.3d 1011, 1016 (7th Cir. 2006) (equitable tolling of the 90-day motions deadline requires a showing of due diligence). Nor has he provided sufficient facts for us to properly consider the issue. The respondent has submitted a 7-page affidavit in support of his motion. However, the affidavit is missing page 4 which appears to relate to his claim against his prior attorney, Mr. Villasuso. According to the complaint the respondent filed against Mr. Villasuso with the Illinois authorities, he retained Mr. Villasuso to represent him on appeal after his August 27, 2004, hearing. He claims to have called Mr. Villasuso numerous times without success. In February, 2007, he took his file to an unidentified attorney who did not inform him of the Board's June 2, 2005, order. In April 2007, he met with current counsel who assisted him in filing the instant motion the following month. Based on these sketchy factual allegations it is impossible to determine whether the respondent diligently followed his case with Mr. Villasuso while his appeal was pending or his reasons for waiting until February 2007, to investigate the status of his case. This is especially true where the respondent has completely failed to assert that equitable tolling is warranted based on his exercise of due diligence.

Accordingly, the respondent's motion to reopen is denied as untimely filed and we need not reach the substantive allegations raised therein.

ORDER: The motion to reopen is denied.

/s/ Frederick D. Hess
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Executive Office for Immigration Review
Board of Immigration Appeals

IN THE MATTER OF:	)	IN DEPORTATION
	)	PROCEEDINGS
	)	
JOSE ANAYA-Aguilar,	)	
Respondent.	)	A 29-665-793

RESPONDENT'S MOTION TO REOPEN DEPORTATION PROCEEDINGS DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL

NOW COMES RESPONDENT, above named, by his attorney, Mary L. Sfasciotti and moves the Board of Immigration Appeals, pursuant to 8 C.F.R. §1003.2(c)(4)(ii) for an order reopening deportation proceedings for the purpose of asserting his right to cancellation of removal and for any other relief the court may consider. The basis for Respondent's motion, as shown by the attached applications and supporting documentation, is based on the ineffective assistance of counsel of Attorney Raul Villasuso, in preparing, documenting and presenting Respondent's application for cancellation of removal on and before August 27,2004, and his concealment of the fact that this Board had dismissed his appeal on June 2, 2005, the existence of which, Respondent discovered on or about April 18, 2007. He hired his current counsel on April 21, 2007.

In support of this motion, Respondent submits his affidavit and copies of documents that his attorney failed to present in 2004, to show that he had evidence of facts to support his claim of extraordinary extreme hardship to his U.S. citizen sons, which Villasuso did not present. Respondent further alleges and states:

(1). Respondent was born in Huitzuco, Guerrero, Mexico

on January 12, 1969 to a large family. He has lived continuously in the United States for seventeen years and has established a family composed of his wife, Rosa, a Mexico citizen, and three sons, and their three sons, Jose, Jr., Daniel and Isaac, all of whom live in the Untied States. (Exhibit A). He resides at 2620 Yeoman in Waukegan, Illinois with his wife, Rosa Colin, and three sons in a home that he purchased with his wife in 2001.

(3) Respondent retained the services of Attorney Raul Villasuso to represent him in removal proceedings in October 2001. He gave Attorney Villasuso money orders totaling $1,725.00. Mr. Villasuso told him to leave the payee's name blank on two of the money orders, Nos. 53626 and 53627, in the amounts of $1000.00 and $500.00. Mr. Villasuso, in turn endorsed the two money orders to a company called BVM Associates, Inc. (Exhibit B).

(4) Mr. Villasuso knew that Respondent had lived in the Untied States for ten years and had two small children born in the United States. He told Respondent that he was eligible for cancellation of removal but that such applications are not granted often. Believing that his client had a slim chance of getting that relief, Villasuso filed a minimal application, consisting of proof of his residence of ten years; his marriage certificate and his sons' birth certificates. Exhibit C. At the hearing he submitted some pay stubs and an employment letter.

(5) He did not request any further evidence from Respondent as to medical, financial, psychological or educational hardship to his two children.

(6) A hearing was held on August 27, 2004. Respondent was the sole witness in this case. The transcript of the very brief merits hearing shows that Villasuso did not present any aspect of hardship in Respondent's case and in fact, he referred to Respondent's son, Daniel, as Danielle. He elicited no information concerning Respondent's health that might affect his ability to find work in Mexico. Exhibit D.

(7) The Immigration Judge denied Respondent relief for

lack of evidence of extraordinary hardship to his U.S. citizen sons, finding that there were "no medical issues." Exhibit E.

(8) Villasuso appealed the case to the Board of Immigration Appeals but failed to inform Respondent that the Board had dismissed his appeal on June 5, 2005. Exhibit E.

(9) His many phone calls to Attorney Villasuso were not returned and Respondent never knew the status of his case until sometime in April 2007. (See Respondent's affidavit attached hereto). He obtained a copy of the attorney's file in February 2007 to consult with another attorney. The file that he received from Villasuso did not contain the Board's final dismissing his case on June 5, 2005. The lawyer whom Respondent consulted for an opinion on his case, told him that his case was still pending before the board, when in fact it had been dismissed more than a year before.

(10) Respondent learned of the status of his case when he received a notice from the Immigration Service, dated March 30, 2007, informing him that the voluntary departure bond that he had posted had been forfeited. He faxed a copy of this notice to Villasuso with a note in Spanish stating that he did not understand the notice and would the attorney call him. Exhibit F. Villasuso phoned Respondent, telling him that he did not remember seeing a Board decision but that the bond forfeiture was because Respondent had not left the United States. Respondent then asked the attorney to furnish him with a complete copy of his file and he retained Mary L. Sfasciotti to represent him on April 21, 2007.

(11) Attorney Villasuso was negligent, inattentive and indifferent to Respondent's application for cancellation of removal in that he filed a minimal application, supported only by birth certificates of his children and his marriage to Rosa Colin. Exhibit G. The transcript of the hearing shows that Villasuso asked only cursory questions, omitting any information about Respondent's health or his

sons' health. He proffered no evidence about conditions in Mexico that might affect the well-being of his children.

(12) Had Villasuso been diligent and responsible in his representation of Respondent and conducted a minimal investigation of his circumstances, he would have discovered that, on the date of the merits hearing and prior thereto, that:

A. Respondent suffered from traumatic glaucoma in his right eye and had surgery for that condition in 2001. Respondent lost nearly all vision in his right eye. Exhibit G. He is required to undergo eye examinations twice a year. This evidence is relevant to Respondent could obtain gainful employment in Mexico with limited vision and whether he could receive good medical care for his eye problems in Mexico.

B. Respondent suffered from severe asthma, allergic rhinitis and migraine headaches, for which he has been under a doctor's care for those conditions since 1996. Exhibit H. This evidence is relevant as to whether Respondent's medical problems, exacerbated by environmental pollution in Mexico would prevent him from obtaining sustainable gainful employment in Mexico without adverse respiratory consequences. Mr. Villasuso did not present any medical evidence about Respondent's health.

C. Respondent's son, Daniel, born on February 8, 2003, as a year-old infant, suffered from contact dermatitis, bronchitis, and pneumonia. Exhibit I. This evidence was not produced at the hearing. Villasuso failed to research whether Daniel's illnesses would be exacerbated by living in Mexico as an infant, despite existing documentation available on the Internet, that as early as 1986, 28% of the children living in the State of Guerrero had acute respiratory infections. Exhibit M.

D. Mr. Villasuso did not investigate whether

Respondent's sons would have health problems in Mexico, considering that Mexican children suffer from intestinal parasites caused by contaminated raw vegetables, water and other environmental hazards. Exhibit L. The inability of the children's parents to provide uncontaminated vegetables and safe drinking water to their small children would be extraordinary hardship but this evidence was overlooked by the attorney.

E. Respondent's oldest son, Jose, Jr. born on February 14, 2001, is severely allergic to mosquito bites. He also develops a rash when exposed to plants and allergic to penicillin. Exhibit J. The health problems his children would face in Mexico are well-known. Malaria and other diseases are caused by mosquitos in Mexico and would be of significant harm to his son, Jose, Jr,. who is severely allergic to mosquito bites. Information about these conditions is well documented and available on the Internet. Considering that Villasuso had three years to research country conditions in Mexico that would present extraordinary hardships to Respondent's small sons was not only negligence but an inexcusable dereliction of responsibility in Respondent's case.

F. In 2002, Respondent and his wife purchased a home in Waukegan, Illinois and secured a mortgage in the amount of $107,000. Exhibit N. He and his wife pay monthly mortgage and property taxes of $1,007.00 per month. This evidence was not produced in the deportation hearing and would have bene relevant to show the economic hardship to Respondent and his family if they had to lose their home by his deportation to Mexico.

G. Respondent was self-employed as a handyman as shown by the joint income tax returns filed for 2002. Exhibit O. He was the major wage earner in his family. He also was developing a good client base

with satisfied customers. Exhibit P. The attorney elicited none of these facts form the Respondent at the final hearing on August 27, 2004.

(13) In light of his former attorney's serious derelictions, Respondent merits reopening of his case to present the evidence pertaining to extraordinary hardship, to wit:

A. Respondent and his wife are the parents of a third son, Isaac, born on March 30, 2007 in Waukegan. Exhibit A. Respondent asserts that his wife does not earn enough to support his three sons if he were deported to Mexico.

B. Respondent has incorporated his business in Illinois and has one employee. Exhibit Q. He has worked diligently to establish his reputation for reliable and conscientious services. Exhibit R. He would lose his business and the good will he has built up in the Untied States as a result of years of his self-employment as a handyman. He could not create the same kind of business in Mexico nor could he find sustainable employment due to his own medical problems. He and his family face a future of abject poverty in Mexico. Exhibit X.

C. Respondent and his wife have a combined income of $50,539.00 as reflected on his 2006 income tax return Exhibit S. They can afford a nice home in Waukegan for their three sons and pay for medical bills that Respondent and his children have incurred. Respondent's wife would be unable to meet the monthly mortgage expenses and property taxes from her income alone and, if she chose to remain in the United, she and their three sons would face serious economic problems.

D. Respondent's oldest son, Jose, Jr., now age seven, is considered a brilliant student and is doing extremely well in the Waukegan public schools. Exhibit T. If forced to return to Mexico,

he would experience severe academic setbacks,

particularly if he lived in Huitzuco, Guerrero, which has a chronic shortage of teachers. Exhibit U. Mexico has a poor educational system. Only 62% of Mexican children complete their education through the primary grades and in the rural area the figure is much higher. Exhibit U. Jose, Jr. would never experience the same educational opportunities and attention from teachers in Mexico as he is receiving in the United States. This would be an extraordinary hardship given his aptitude for learning.

E. Jose Jr. lives in a stable, loving home environment with two caring parents. They are concerned about his schooling and his health. Regardless of whether he must live in Mexico with his father or remain in the United States, his father's deportation would be a serious, traumatic event for him. Respondent submits a lengthy study funded by the National Institutes of Health that shows how children who have experienced secure parent-child relationships during elementary school years are socially competent in adolescence. Even toddlers, who are securely attached to their parents demonstrate greater sociability and are positively oriented toward unfamiliar peers than toddlers having insecure attachments. Exhibit W. The quality of the child-parent attachment has been linked with social competence and good adjustment and without strong child-parent attachment, there are demonstrated maladjustments from early childhood through adolescence. The study, published in the Journal of Early Adolescence (November 2004), showed that young adolescents reporting greater parental support from fathers and mothers regarded themselves as more worthy and socially competent. Exhibit W. Adolescents reporting greater paternal support from a father were less likely to be rejected and victimized by their peers.

Id. This is a case where competent psychological evidence in the form of an evaluation of the Anaya children and parents would be relevant of the issue of extraordinary hardship.

(14) That Attorney Villasuso was indifferent to Respondent's circumstances and severely negligent in failing to investigate and discover evidence to show factors which, in their aggregate, would demonstrate extraordinary hardship to Respondent's sons if he were deported to Mexico. Such evidence that existed on or before August 27, 2004 and there is continuing proof of extraordinary hardship.

(15) The transcript of hearing of August 27, 2004, when Respondent testified, shows the extent of Villasuso's indifference by presenting a superficial case of statutory entitlement to cancellation of removal. He was more concerned with the Respondent's minor arrest record than with any aspect of family hardship. His inadequate representation was directly responsible for the denial of Respondent's application for cancellation of removal. His inattention, indifference and negligence denied Respondent full, fair and meaningful opportunity to present his case.

(16) Furthermore Villasuso concealed the Board's decision of June 2, 2005 from the Respondent and as a direct result, Respondent lost the privilege of voluntary departure and a $500.00 bond he had posted to guarantee he would leave at his own expense should his appeal be dismissed. The first indication of any problems was a notice he received dated March 30, 2007 advising him that the voluntary departure bond of $500.00 had been forfeited because he did not voluntarily depart the Untied States. He contacted Villasuso by phone and fax, asking him to explain what the notice meant. Villasuso denied ever seeing the Board's order and had conveniently left that final decision out of the file he gave Respondent in February 2007. By reason of such concealment, Respondent was not able to obtain a competent second

opinion from another lawyer.

(16) Respondent retained the undersigned on April 21, 2007. She has diligently obtained medical records, tax records, and business records form the Respondent. She also has spent time researching country conditions in Mexico to obtain proof of the extraordinary hardship's Respondent and his sons face in Mexico if forced to return there.

(17) Respondent has filed a request for investigation with the Attorney Registration and Disciplinary Commission against Mr. Villasuso, as required by *Matter of Lozada*, 19 I.&N. Dec. 637 (BIA, 1988). Exhibit Z. Respondent requests reopening of these proceedings.

(18) A copy of this motion and exhibits will be furnished to Attorney Villasuso.

Respectfully submitted,
/s/ Mary L. Sfasciotti
MARY L. SFASCIOTTI
Attorney for Respondent

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UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Executive Office for Immigration Review
Board of Immigration Appeals

IN THE MATTER OF:	IN REMOVAL PROCEEDINGS
JOSE ANAYA-Aguilar,	A 29-665-793
Respondent	

RESPONDENT'S UPDATED LIST OF EXHIBITS IN SUPPORT OF HIS MOTION TO REOPEN

Exhibit Number	Document Description
A.	Birth Certificates of Jose, Jr., Daniel and Issac Anaya
B.	Money orders paid to Attorney Villasuso
C.	List of Exhibits filed by Attorney Villasuso at the immigration court to support Respondent's application for cancellation of removal
D.	Transcript of hearing of August 27, 2004
E.	Decision of Immigration Judge denying cancellation of removal and decision of Board of Immigration Appeals dated June 2, 2005

F. Notice of bond forfeiture issued on March 30, 2007, with translation of note

G. Physician's letter regarding Respondent's treatment for glaucoma

H. Patient's notes regarding Respondent's treatment for asthma, allergic rhinitis and migrane headaches

I. Medical records relating to the treatment of Daniel Anaya and article from Medline Plus, Respiratory Syncythial Virus Infections, www.nih.gov/medlineplus

J. Doctor's note regarding Jose Anaya, Jr's severe reaction to mosquito bites; Article from Centers for Disease Control and Prevention, www.idre

K. Irma Rosas, Air pollution contributing to respiratory problems, Newsletter of the North American Commission for Environmental Cooperation (2001)

L. Mexico:IntestinalParasites,1990, www. ciet.org/en/documents /projects/200621219041.asp

M. Mexico: Acute Respiratory Infections in Under-Fives (1986), www. ciet.org/en/ documents/projects/200621219109.asp

N. Financial disclosure agreement re: Jose Anaya and Rosa Colin, for home

at 2620 Yeoman Street, Waukegan, Illinois

O. 2002-2003 Federal Tax returns filed by Respondent and his wife

P. Letters of Recommendation regarding the services performed by Jose Anaya from Elizabeth Hill

Q. Proof of Incorporation of J.A. Handyman Services, Inc. with the Illinois Secretary of State on February 2, 2007; Employer's Contribution and Wage Report submitted to the Illinois Departmetn of Revenue and Employer's Quarterly Federal Tax Return

R. Statement of Appreciation from tenants of property located in 8515-32nd Avenue in Kenosha, Wisconsin and from Marietta Permann, tenant at 8515 - 32nd Avenue, Kenosha, Wisconsin

S. 2006 Joint federal income tax returns of Jose Anaya and Rosa Colim

T. Letter from Monica Terrades, Teacher, Whittier Kindergarten Center, Waukegan Public Schools regarding Jose Anaya, Jr. and Certificate of Achievement for regular school attendance issued to Jose Anaya, Jr.

U. Articles regarding poor educational opportunities for children in Mexico,

country studes, U.S. Library of Congress, http://countrystudies.us/mexico/62.htm; Dr. José Enrique Vallarta Rodríguez, Mexico's Costly and Dysfunctional School System, MEXICDATA. INFO, April 30, 2007 http://www.mexidata.info/id1349.html; article on the shortage of teachers in the State of Guerrero

V. John Barnham, Some thoughts North looking South, Dec. 15, 2006,www.Atencionsan.miguel.org/archhivess/col_nort_2006_dec_15_eng.html

W. Kenneth H. Rubin, Kathleen M. Dwyer, Angel H. Kim, and Kim B. Burgess, Attachment, Friendship, & Psychosocial Functioning in Early Adolescence, Journal of Early Adolescence, 2004 November 1; 24(4): 326356.

X. Mexico Labor Report, 2001-2006, Institute for Labor Studies, (March 9, 2007)

Z. Attorney Registration and Disciplinary Commission, ("ARDC") Request for Investigation of Attorney Raul Villasuso, Jr.

Z-1 Attorney Raul Villasuso, Jr. response to the ARDC;

Z-2 Respondent's reply to the ARDC

Z-3 Correspondence from the ARDC dated May 21, 2007;

U.S. Department of Justice
Executive Office for Immigration Review
United States Immigration Court

Matter of		File A 29 665 793
JOSE ANAYA-AGUILAR,	)	In REMOVAL
	)	PROCEEDINGS
	)	
Respondent.	)	Transcript of Hearing

Before: RENETTA SMITH, Immigration Judge

Date: June 12, 2001 Place: Chicago, Illinois

Transcribed by FREE STATE REPORTING, INC., at Annapolis, Maryland

Official Interpreter: Famy Filipiak
Language: Spanish
Appearances:

For the Immigration and Naturalization Service:	For the Respondent:
Stanislaus A. Gonzalves	Raul Villasuso

JUDGE FOR THE RECORD
For the record, this is a removal hearing being held 6/12/01, before Immigration Judge Renetta Smith, sitting in Chicago, in the matter of Jose Anaya Aguilar, 29 665 793. Respondent's in Court represented by Attorney Raul Villasuso. The Immigration Service, by Attorney Stan Gonsalves. Also present is my assistant and the Court interpreter, Ms. Famy Filipiak.

JUDGE TO MR. GONSALVES AND MR. VILLASUSO
Both sides please identify yourselves for the record.

MR. VILLASUSO TO JUDGE
Raul Villasuso, on behalf of respondent.

MR. GONSALVES TO JUDGE
Stan Gonsalves, on behalf of the Service.

JUDGE TO MR. GONSALVES AND MR. VILLASUSO
Thank you very much.

JUDGE TO MR. VILLASUSO
Counsel, you do acknowledge receipt of the Notice to Appear?

MR. VILLASUSO TO JUDGE
I will acknowledge receipt, however, I don't have it with me today.

JUDGE TO MR. VILLASUSO
Okay. Why don't we make a quick of the Notice to Appear now.

MR. VILLASUSO TO JUDGE
Thank you, Judge.

JUDGE FOR THE RECORD
I'll make Exhibit 1 for the record.

JUDGE TO MR. VILLASUSO
Request a continuance for attorney preparation?

MR. VILLASUSO TO JUDGE
Yes, Judge.

JUDGE TO MR. VILLASUSO.
Okay,. If you intend to contend that he is eligible to apply for any form of relief, you'll need to be able to establish statutory eligibility at the Master Calendar hearing.

MR. VILLASUSO TO JUDGE
All right.

JUDGE TO MR. VILLASUSO
2/19/02, at 11:00. Please have your client back then. If he doesn't come back he'll be ordered removed in his absence and he may not be eligible for certain forms of relief. Ms. Filipiak will hand you written notice of the hearing date, and a copy of the consequences if the client fails to appear. Anything further?

MR. VILLASUSO TO JUDGE
Nothing, Judge.

JUDGE FOR THE RECORD
This matter's adjourned under the conditions stated.

HEARING ADJOURNED

U.S. Department of Justice
Executive Office for Immigration Review
United States Immigration Court

Matter of File A 29 665 793

JOSE ANAYA-AGUILAR,	)	In REMOVAL
	)	PROCEEDINGS
	)	
Respondent	)	Transcript of Hearing

Before: RENETTA SMITH, Immigration Judge
Date: February 19, 2002 Place: Chicago, Illinois
Transcribed by FREE STATE REPORTING, INC., at Annapolis, Maryland

Official Interpreter: Famy Filipiak
Language: Spanish
Appearances:

For the Immigration and Naturalization Service	For the Respondent
John H. Gountanis	Raul Villasuso

JUDGE FOR THE RECORD
For the record, this is a continued removal hearing being held 2/19/02, before Immigration Judge Renetta Smith, sitting in Chicago, in the matter of Jose Anaya Aguilar, 29 665 793. Excuse me. The respondent's in Court today represented by attorney, Attorney Raul Villasuso. The Immigration Service by Attorney John Gountanis. Also present is my assistant, and Court interpreter, Ms. Famy Filipiak.

JUDGE TO MR. GOUNTANIS AND MR. VILLASUSO
Both sides please identify yourselves for the record.

MR. VILLASUSO TO JUDGE
Raul Villasuso, on behalf of the respondent.

MR. GOUNTANIS TO JUDGE
John Gountanis, on behalf of the Service.

JUDGE TO MR. GOUNTANIS AND MR. VILLASUSO
Thank you very much.

JUDGE TO MR. VILLASUSO
Counsel, the Notice to Appear was previously marked as an Exhibit 1. Have you had an opportunity to explain the nature of these proceedings to you r client?

MR. VILLASUSO TO JUDGE
Yes, Judge.

JUDGE TO MR. VILLASUSO
Waive a formal reading of the five factual allegations?

MR. VILLASUSO TO JUDGE
Yes, Judge.

JUDGE TO MR. VLLASUSO
And how do you elect to plead, sir?

MR. VILLASUSO TO JUDGE
We admit the allegations, concede removability, indicate Mexico, place of removal, should it be necessary, and we would request an opportunity to file cancellation of removal, in the alternative, voluntary departure.

JUDGE TO MR. VILLASUSO
Okay. Qualifying relatives?

MR. VILLASUSO TO JUDGE
A United States citizen child.

JUDGE TO MR. VILLASUSO
Okay. And you have the birth certificate?

MR. VILLASUSO TO JUDGE
Yes.

JUDGE TO MR. VILLASUSO
You showed counsel?

MR. VILLASUSO TO JUDGE
I even gave him a copy.

JUDGE TO MR. VILLASUSO
Good enough for me.

MR. VILLASUSO TO JUDGE
Okay.

JUDGE TO MR. VILLASUSO
Okay. And how long will you need to prepare the application?

MR. VILLASUSO TO JUDGE
Sixty days.

JUDGE TO MR. VILLASUSO
Sixty days?

MR. VILLASUSO TO JUDGE
Yes.

JUDGE TO MR. VILLASUSO
4/23/02, call up for application on cancellation and supporting document and fingerprint request. Hearing to be held – any criminal record?

MR. VILLASUSO TO JUDGE
No, Judge.

JUDGE TO MR. VILLASUSO
February 21st, '03, 1:00. You need a Spanish interpreter?

MR. VILLASUSO TO JUDGE
Yes.

JUDGE TO MR. VILLASUSO
We'll make one available. Additional call up date, February 11th, '03, for other documents. Please explain to you r client when he is to come back. If he doesn't he'll be ordered removed in his absence and he may not be eligible for certain forms of relief. Ms. Filipiak will give you notice and a copy of the consequences.

JUDGE FOR THE RECORD
The matter's adjourned under the conditions stated.

HEARING ADJOURNED

U.S. Department of Justice
Executive Office for Immigration Review
United States Immigration Court

Matter of		File A 29 665 793
JOSE ANAYA-AGUILAR,	)	In REMOVAL Proceedings
	)	
Respondent	)	Transcript of Hearing

Before: JENNIE L. GIAMBASTIANI, Immigration Judge,
Date: August 27, 2004 Place: Chicago, Illinois
Transcribed by FREE STATE REPORTING, INC., at Annapolis, Maryland

Official Interpreter: Mario Candia
Language: Spanish
Appearances:

For the Department of Homeland Security:	For the Respondent:
Michael L. Harper	Raul Villasuso

JUDGE FOR THE RECORD

This is a removal hearing in the matter of Jose Anaya Aguilar, file 29 665 793. This is being heard by Immigration Judge Jennie Giambastiani, at the Immigration Court in Chicago, Illinois, on August 27, 2004. The respondent appears in Court today represented by his attorney, Raul Villasuso. The Government is represented by Assistant Chief Counsel, Michael Harper and the official Court interpreter in the Spanish language is Mario Candia.

JUDGE TO MR. HARPER AND MR. VILLASUSO

Counsels, identify yourselves for the record please.

MR. VILLASUSO TO JUDGE

Raul Villasuso, on behalf of respondent.

MR. HARPER TO JUDGE

Mike Harper, DHS. I'm sorry.

JUDGE TO MR. HARPER

Okay.

JUDGE TO MR. ANAYA

Q. Please tell me your name, sir.
A. Jose Anaya Aguilar.
Q. Okay. Good morning, sir. Sir, do you still live at 550 North Sheridan, Apartment 2, in Highwood?
A. No.
Q. You moved?
A. Yes.
Q. Okay. What is your current address, sir?
A. 2620 Yeoman Street.
Q. 2620 Yeoman?
A. Yeoman, yeah.
Q. Y E O M A N?
A. Correct.
Q. Is that a house, a house or an apartment?
A. A house.
Q. What city is that?
A. Waukegan.
Q. Okay. And your zip code, sir?
A. 60087.
Q. Okay. Do you own that house or do you just rent?
A. I rent.
Q. All right.

MR. VILLASUSO TO JUDGE

Judge, I'm preparing a change of address form.

JUDGE TO MR. VILLASUSO

Thank you, Mr. Villasuso.

JUDGE FOR THE RECORD

What I have in the file thus far is the Notice to Appear. There was an application for cancellation of removal, non-

LPR removal – I mean, cancellation, filed with the Court back in August of 2003, with attached Exhibits 1 through 8.

JUDGE TO MR. HARPER
Do you have those, Mr. Harper?

MR. HARPER TO JUDGE
I'm sorry, when was it filed?

JUDGE TO MR. HARPER
It was filed back in August of 2003. It's the application –

MR. HARPER TO JUDGE
No.

JUDGE TO MR. HARPER
–a copy of a marriage certificate, the, the G's (sic).

MR. HARPER TO JUDGE
Okay. I have that.

JUDGE TO MR. HARPER
Okay. Any objection to that being group Exhibit No. 2?

MR. HARPER TO JUDGE
No objection. 2?

JUDGE TO MR. HARPER
Uh-huh.

MR. HARPER TO JUDGE:
Okay.

JUDGE TO MR. HARPER
And this morning, Mr. Villasuso, filed with the Court a document showing the birth of the respondent's United States citizen child, a letter from a lawn service and then various pay stubs, as proof of continuous physical

presence. Although this has been submitted outside of the local operating procedure rules, Mr. Harper, would you have any objection to those being made a part of the record?

MR. HARPER TO JUDGE
No objection.

JUDGE TO MR. HARPER
All right.

MR. VILLASUSO TO MR. HARPER
Thank you.

JUDGE FOR THE RECORD
They'll be part of the record as group Exhibit 2 as well.

MR. VILLASUSO TO JUDGE
Thank you, Judge.

JUDGE TO MR. VILLASUSO
Okay

JUDGE TO MR. ANAYA

Q. Would you please stand and raise your right hand. Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?
A. Yes.
Q. Okay. If you would, have a seat over here, sir, please.
A. Which side, either side (untranslated)?
Q. Either one.
A. Okay.

JUDGE TO MR. VILLASUSO

Now I – just before we begin the respondent's testimony I have to say that the documentary evidence is somewhat sketchy in this case, Mr. Villasuso.

MR. VILLASUSO TO JUDGE
Yes.

JUDGE TO MR. VILLASUSO
I'd like to ask the Government regarding continuous physical presence. I had a concern about that, but I think that some of the documents submitted by the respondent this morning indicate or, or establish that he's been here for the requisite period of time.

JUDGE TO MR. HARPER
Could we get a stipulation on that?

MR. HARPER TO JUDGE
So stipulate.

MR. VILLASUSO TO JUDGE
Thank you, Judge.

MR. VILLASUSO TO MR. HARPER
Thank you, counsel.

JUDGE TO MR. VILLASUSO
The other concern that I had regarded the answers at Number 56, showing he had three encounters with law enforcement officials. One was for driving without a license, two was for domestic violence and three was for fighting. Do you have any of those dispositions, Mr. Villasuso?

MR. VILLASUSO TO JUDGE
Judge, I do not. Those were requested some time ago. I did not receive them from the client, and I will ask him – I will stand on his, I will submit his testimony to respond to the arrests.

JUDGE TO MR. HARPER
Mr. Harper, were fingerprints done?

MR. HARPER TO JUDGE

Your Honor, I had checked with prints just before the hearing started and our office informs me that there are no, no record of prints. So there's no –

JUDGE TO MR. CANDIA

–to the respondent.

JUDGE TO MR. ANAYA

When is the last time you presented yourself for fingerprints?

MR. ANAYA TO JUDGE

About two months ago.

JUDGE TO MR. ANAYA

Which facility did you go to?

MR ANAYA TO JUDGE

Greenbay Road and Washington, in Waukegan.

JUDGE TO MR. HARPER

And nothing is showing, huh, by his A number, Mr. Harper?

MR. HARPER TO JUDGE

That's correct, Your Honor.

JUDGE TO MR. HARPER

Okay.

JUDGE TO MR. VILLASUSO

Judge go ahead and make sure that you address that through his testimony –

MR. VILLASUSO TO JUDGE

I shall, Judge.

JUDGE TO MR. VILLASUSO

– as much as possible. And are there any changes to be made to the application itself?

MR. VILLASUSO TO JUDGE

Aside from the change of address, no, Judge.

JUDGE TO MR. VILLASUSO

All right.

JUDGE TO MR. ANAYA

Then, sir, would you please approach so I could have you sign your application. I'm showing you your application for cancellation. Do you recognize this as yours?

MR. ANAYA TO JUDGE

(No audible response.)

JUDGE TO MR. ANAYA

You need to say yes or no.

MR. ANAYA TO JUDGE

Yes.

JUDGE TO MR. ANAYA

Okay. If you will, please sign your name where I place the "X." Thank you. Have a seat.

JUDGE TO MR. VILLASUSO

All right. You may proceed, Mr. Villasuso. Since we already have a stipulation as to physical presence, you don't need to delve into that.

MR. VILLASUSO TO JUDGE

Okay, Judge.

MR. VILLASUSO TO MR. ANAYA

Mr. Anaya, do you have any children>?

MR. ANAYA TO MR. VILLASUSO
Yes, I do (untranslated).

JUDGE TO MR. ANAYA
Okay. Sir, do you need an interpreter or not?

MR. ANAYA TO JUDGE
Yes.

JUDGE TO MR. ANAYA
Okay. So try to be consistent –

MR. ANAYA TO JUDGE
Sorry.

JUDGE TO MR. ANAYA
– okay?

MR. ANAYA TO JUDGE
Okay.

MR. VILLASUSO TO MR. ANAYA
Q. Mr. Anaya, I'll ask you the questions in English. Just wait for the question to be translated into Spanish and then go ahead and answer in Spanish and the interpreter will answer in English. Okay? Do you have any children born in the U.S.?
A. Yes.
Q. What are the children's names?
A. Jose Anaya, Jose Anaya Collins.
Q. And when, and when and where was the child born.
A. Waukegan, February 14th 2001, from Waukegan.
Q. And are you married?
A. Yes.
Q. All right. And are you, are you, are you employed?
A. Yes.
Q. Are you the sole support of your family?
A. Yes.

Q. What would happen if – oh, by the way, does your child live with you?
A. Yes.
Q. What would happen with your child if you were to be removed to Mexico?
A. He will suffer a great deal because I wouldn't know how to do it.
How would he suffer?
A. A lot because he is very close to me.
Q. Do you spend a lot of time with your child now?
A. Enough.
Q. And when do you see him?
A. To my children?
Q. Yes.
A. In the morning and in the afternoon.

JUDGE TO MR. ANAYA
Q. But you only have one child, right?
A. No, two.
Q. Okay, So we talked about Jose Anaya Collins who is three years old, right?
A. Danielle Anaya Collins.
Q. And how old is she?
A. She's one year-and-a-half.
Q. Born in the United States?
A. Yes.
Q. Okay.

JUDGE TO MR. VILLASUSO
Proceed.

MR. VILLASUSO TO MR. ANAYA
Q And are you – are – is your family in good health?
A. Yes.
Q. Do you have health insurance?
A. Yes.
Q. And how do you have health insurance?
A. Through my wife.

JUDGE TO MR. ANAYA

Q. How does your wife have insurance?
A. By her work, wherever she works.
Q. Where does she work?
A. In a factory.
Q. Which one?
A. Lake Bluff, called Timberline.
Q. How long has she been working there?
A. About six years.

JUDGE TO MR. VILLASUSO

Go ahead.

MR. VILLASUSO TO MR. ANAYA

Q. Does – is she a lawful resident of the United States?
A. No.
Q. Who would support your child, your children if you were to leave the United States?
A. I don't know.
Q. Do you have family in Mexico?
A. Yes.
Q. And could you live with them in Mexico if you were to return to Mexico?
A. No.
Q. Why not?
A. I don't –
Q. Why, why could you not?
A. Because I couldn't. I do not have a house. The house is not mine.
Q. Do you think you can find a job in Mexico?
A. I don't think so.
Q. Why not?
A. Because over there we are very poor, there isn't any jobs.
Q. How much do you earn here?
A. I am self-employed.
Q. And how much do you earn as a self-employed here, approximately?

A. Weekly, $500, $400.
Q. How much do you think you would earn in Mexico?
A. $50 per week.
Q. How do you know that?
A. Because I do have family over there and they tell me.

JUDGE TO MR. ANAYA

Q We never did hear, what family do you have in Mexico?
A. My mother. My father doesn't live anymore.
Q. Okay. How old is your mom?
A. Sixty-eight.
Q. What town does she live in?
A. Guerrero.
Q. Don't you have any brothers or sisters?
A. Yes.
Q. Where are they?
A. In Guerrero.
Q. Okay. How many brothers and sisters there?
A. We are 11.
Q. So you're number 12 or are you part of the 11?
A. I'm a, I'm a number 11 - I mean –
Q. So you have ten brothers and sisters?
A. Yes.
Q. They're all in Guerrero?
A. Yes.
Q. And they're all working?
A. Some of them, yes. I got one doesn't work at all.
Q. Okay.

MR VILLASUSO TO MR. ANAYA

Q. Could you live with them if you were in Mexico?
A. I don't think so because the house is very small.
Q. Do they have a lot of children?
A. Yes.
Q. Do you think do you think they could support you and your two children should you return to Mexico?

A. No.

JUDGE TO MR. ANAYA

Q. Did you ever work in Mexico before you came to the United States?
A. Yes, a little bit.
Q. What were you doing?
A. I work in – as a brick lawyer (sic) – layer.
Q. Okay. And did you go to school in Mexico?
A. Truthfully, no.
Q. No elementary school, not even first grade?
A. We didn't have money to go to school.

JUDGE TO MR. VILLASUSO

Go ahead.

MR. VILLASUSO TO MR. ANAYA

Have you ever been arrested?

MR. ANAYA TO MR. VILLASUSO

Yes.

MR. VILLASUSO TO MR, ANAYA

How many times have you been arrested?

JUDGE TO MR. ANAYA

Be honest, sir.

MR. ANAYA TO JUDGE

About four.

MR. VILLASUSO TO MR. ANAYA

And for what offenses and where, where were they? When and where were they?

MR. ANAYA TO MR. VILLASUSO

One time I was in Waukegan, and one security push me.

JUDGE TO MR. ANAYA

Did you get arrested for that?

A. I did not allow it.
Q. Did – so what happened?
A. That security, they beat him and they accuse me for that.
Q. What year was this?
A. Around '94.
Q. All right. Did you get convicted of anything?
A. Only that I could not approach the area where that incident happened.
Q. Did you spend any time in jail for that?
A. One day.
Q. Okay. What next?
A. '92, in Haywood –

JUDGE TO MR. CANDIA

Highwood.

MR. ANAYA TO JUDGE

Highwood, Highwood, and they stopped me because I step on the sidewalk and that's why I was stopped.

JUDGE TO MR. ANAYA

Q. You stepped on a sidewalk and you were stopped?
A. The car, the car.
Q. Oh, you drove on the sidewalk?
A. Yes, yes.
Q. Okay. What, what happened then?
A. They arrest me.
Q. Did you – did anything else come of that? Did you9 have to do any time in jail? Were you convicted of anything?
A. Just one night. Just spend the night and the next I'm out.
Q. Were you drunk when that happened?
A. No, no, no.
Q. Did you have a driver's license?

A. (No audible response.)
Q. So you got in trouble for no driver's license?
A. Yes.
A. The only one was a fight that I had with my ex-wife in Kenosha.
Q. What happened?
A. At that time she struck me and I did not allow to do that to me, and I hit her back.
Q. Did she have to go to the hospital?
A. No. It was just a little bit, it was just a push.
Q. And she prosecute – you were prosecuted for domestic violence?
A. Yes.
Q. What was your conviction for that?
A. They told me if I had another occasion, another time they were going to put me in jail for time, for a certain time.
Q. What year was that?
A. Something about – around '92, '93.
Q. Okay. Did you get probation maybe? Is that what happened? Or –
A. No, no, no I didn't get probation.
Q. So I can't – I don't know - well, I can't figure out what happened when you went to court, if it was pled down to misdemeanor battery or something, I don't know.

MR VILLASUSO TO JUDGE

You can ask him if he understands supervision and probation.

JUDGE TO MR. VILLASUSO

I don't think we're going to get much. Okay.

MR. VILLASUSO TO MR. ANAYA

Q. Now, you said that you had another wife before, huh, this one here that you talked about?
A. Yes.

Q. What's here name?
A. Anita Anaya –
Q. Uh-huh.
A. – Amuma (phonetic sp.)
Q. Okay. What next, sir?
Q. Okay. What next, sir?
Q. When did you get divorced?
A. (No audible response.)
Q. Did you get divorced?
A. Yes.
Q. Okay. When?
A. Around '94.
Q. Okay. And you have no children from her?
A. No.
Q. She never filed papers for you?
A. Once.
Q. And what happened?
A. I never wait.
Q. Okay.

JUDGE TO MR. VILLASUSO
Go ahead.

MR. VILLASUSO TO MR. ANAYA
And your fourth arrest?

MR. ANAYA TO JUDGE
(Untranslated).

JUDGE TO MR. ANAYA
Q. You listed two fighting offenses. You told me about one. I don't have a – I assume that the next one is fighting?
A. Yeah, the fight with security, the guard.
Q. Okay. But you told us you've been arrested four times, one was the issue with the security officer, then it was for driving on the sidewalk, then it was for domestic. There's one missing.

A. The other one because there was an accident.
Q. Traffic accident?
A. Yes, traffic.
Q. What happened?
A. I was driving to a friend of mine. And I was driving and he got the steering wheel and then I struck and crashed.
Q. What did you hit?
A. A tree.
Q. Anybody get injured?
A. Only one friend.
Q. Okay. What next, sir?
Q. And what happened to the friend?
A. He was – he got hit over here, nothing serious.
Q. And the police got you that time again for driving without a license?
A. Yes.
Q. Okay. And jail time?
A. About four hours.

JUDGE TO MR. VILLASUSO
Go ahead, Mr. Villasuso.

MR. VILLASUSO TO JUDGE
Thank you, Judge.

MR. VILLASUSO TO MR. ANAYA
Q. Mr. Anaya, were you, you said – you mentioned earlier that you were fingerprinted a couple of months ago? Is that correct?
A. More or less.
Q. And could that have been on July 17, 2004?
A. I believe so.
Q. Okay. Could that have been also at 25 South Greenbay Road, in Waukegan?
A. Yes.
Q. Did they give you any kind of receipt for that fingerprinting?

A. Yes.
Q. Do you have that with you?
A. (No audible response.d
Q. Do you have any other receipt, any other document?

MR. HARPER TO MR. VILLASUSO
This is the notice of the hearing.

MR. VILLASUSO TO JUDGE
Judge, for the record, I, I was being handed a notice of the hearing for today's date, not any receipt for – indicating Immigration, indicating fingerprints.

JUDGE TO MR. VILLASUSO
Okay.

MR. VILLASUSO TO JUDGE
Judge, I have no further questions.
Q. Okay. What next, sir?

JUDGE TO MR. VILLASUSO
Would you like to qualify him for voluntary departure?

MR. VILLASUSO TO JUDGE
Yes, Judge.

MR. VILLASUSO TO MR. ANAYA
Q. Mr. Anaya, if, if you were required to leave the United States would you leave under the Judge's order?
A. Yes.
Q. Do you have the funds to pay for your departure whether you leave by plane or car?
A. Yes.

MR. VILLASUSO TO JUDGE
Judge, I have no further questions.
JUDGE TO MR. HARPER

Mr. Harper, any questions?

MR. HARPER TO JUDGE
No questions from me, Your Honor.

JUDGE TO MR. HARPER
Okay.

JUDGE TO MR. VILLASUSO
Is there anything else for the record –

MR. VILLASUSO TO JUDGE
No Judge.

JUDGE TO MR. VILLASUSO
– Mr. Villasuso?

MR. VILLASUSO
No, Judge.
Q. Okay. What next, sir?

JUDGE TO MR ANAYA

Sir, you've been here for a long time. However, it is very difficult to meet one's burden of proof for cancellation of removal under the current state of the law. And it's a very heavy burden of proof the way Congress has rewritten the laws. And you need to show what we call extremely unusual and exceptional hardship to your two United States citizen children in order to qualify, and I just don't feel that that's been established in this case. Your children are really young, so since they're your only qualifying relatives you would need to show that they're so entrenched in American life that they would suffer this exceptional hardship if sent back to Mexico and I just don't see it. Also, I'm not sure because no dispositions were provided to me if it's entirely clear that you would merit this as a matter of law or as a matter of discretion because

of your criminal background, although I don't think that the crimes you described would have removed you from this form of relief as a matter of law. There's a lot of talk of possible amnesties and perhaps if you take an appeal of my decision, something will come up that will allow you to remain in the Untied States. So I'm going to enter my order. Your attorney told me he's already explained this to you and because I think you are eligible for voluntary departure, you wou9ldn't been removed at Government expense, so you could always return to the Untied States legally. Okay. Why don't you go ahead and have a seat next to your lawyer while I render my decision.

JUDGE FOR THE RECORD
This will be the order of the Court

JUDGE RENDERS ORAL DECISION
(TAPE 2)

JUDGE FOR THE RECORD
We're back on the record.

JUDGE TO MR. HARPER
You heard my order, Mr. Harper. Do you accept my decision and waive appeal?

MR. HARPER TO JUDGE
So accepted.

JUDGE TO MR. HARPER
Okay.

JUDGE TO MR. VILLASUSO
And you would like to reserve appeal, counsel?

MR. VILLASUSO TO JUDGE
Yes, Judge.
JUDGE TO MR. VILLASUSO

Your appeal is due November – I'm sorry, September 27th, 2004.

MR. VILLASUSO TO JUDGE
Thank you, Judge.

JUDGE TO MR. VILLASUSO
Now, five business days from today for the posting of the voluntary departure bond brings you to – Saturday, Sunday, Monday – oh, Friday, Saturday – next Friday, I guess. Okay.

MR. HARPER TO JUDGE
How much was that bond again?

JUDGE TO MR. HARPER
$500.

JUDGE TO MR. VILLASUSO
And that's just imposed by statute. Okay?

MR. VILLASUSO TO JUDGE
Yes, Judge.

JUDGE TO MR. VILLASUSO
All right.

JUDGE TO MR. HARPER AND MR. VILLASUSO
I already explained my order to the respondent, so if there's nothing further from either side, this concludes this proceeding.

MR. VILLASUSO TO JUDGE
No, Judge.

JUDGE TO MR. VILLASUSO
Nothing further?
MR. VILLASUSO TO JUDGE

No, Judge.

HEARING CLOSED

Supreme Court, U.S.
FILED
AUG 3 0 2009
OFFICE OF THE CLERK

No. 08-1484

In the Supreme Court of the United States

JOSE ANAYA-AGUILAR, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals erred in holding that it lacked jurisdiction to review the Board of Immigration Appeals' denial of petitioner's motion to reopen immigration proceedings under 8 U.S.C. 1252(a)(2)(B)(ii) and (D).

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a) is not published in the *Federal Reporter* but is reprinted in 302 Fed. Appx. 481. The decisions of the Board of Immigration Appeals denying petitioner's motion to reopen (Pet. App. 8a-9a) and motion for reconsideration (Pet. App. 6a-7a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2008. A petition for rehearing was denied on February 23, 2009 (Pet. App. 2a). The petition for a writ of certiorari was filed on May 18, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to expedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. As relevant here, Congress amended the INA to limit judicial review of certain discretionary decisions of the Attorney General. As amended, the relevant section of the INA now provides that no court shall have jurisdiction to review any

> decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii). The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, Subchapter II, which is codified at 8 U.S.C. 1151-1381 and pertains broadly to immigration matters. See *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

In 2005, Congress amended the INA to include the following provision:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

b. The Board of Immigration Appeals (Board) may reopen any proceedings in which it has previously entered a decision. 8 U.S.C. 1229a(c)(7). An alien may file a motion to reopen removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c). The alien must "state the new facts that will be proven at a hearing to be held if the motion is granted" and must support the motion "by affidavits or other evidentiary material." 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1). The Board shall not grant the motion to reopen "unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1). An alien may file only one such motion to reopen, and it must be filed within 90 days of entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2).

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). That interest is especially strong in the immigration context, where "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). The Board has broad discretion in adjudicating a motion to reopen, and it may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R.

1003.2(a); see *Doherty*, 502 U.S. at 323; *Abudu*, 485 U.S. at 110; *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984).

c. Cancellation of removal is a form of relief from removal that allows an alien who has been physically present in the United States for at least ten years, who has not committed certain crimes, and who has been a person of good moral character to remain in the country because of the extreme hardship that removal would cause to certain United States citizen or lawful permanent resident family members. To be eligible for cancellation of removal, the alien must demonstrate, *inter alia*, that "removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1229b(b)(1). The alien bears the burden of proving eligibility for cancellation of removal. 8 C.F.R. 1240.8(d). Even if the alien demonstrates eligibility for cancellation of removal, the decision whether to grant cancellation of removal is entrusted to the Attorney General's broad discretion. 8 U.S.C. 1229b(b)(1).

2. Petitioner is a native and citizen of Mexico. Pet. App. 3a, 10a. He entered the United States without authorization on an unknown date. *Id.* at 3a. He was charged with being removable as an alien present in the United States without being admitted or paroled, see 8 U.S.C. 1182(a)(6)(A)(i), and as an alien not in possession of a valid entry document, see 8 U.S.C. 1182(a)(7)(A)(i)(I). Administrative Record (A.R.) 417. Petitioner appeared before an immigration judge (IJ) with counsel, conceded removability, and sought cancellation of removal and voluntary departure. A.R. 417-418; see Pet. App. 28a, 32a-33a. The IJ held a hearing on the merits of petitioner's claims. Pet. App. 31a-51a.

The IJ determined that petitioner is removable, denied his application for cancellation of removal, and granted his application for voluntary departure. A.R. 417-427. As relevant here, the IJ determined that petitioner failed to demonstrate eligibility for cancellation of removal because he did not establish that his removal would cause exceptional and extremely unusual hardship to his United States citizen children. A.R. 424-425.

The Board affirmed, without opinion, the immigration judge's decision. A.R. 393. The Board specifically noted that petitioner was required to depart the United States within 60 days, or he would become statutorily ineligible for a period of ten years for various forms of discretionary relief, including cancellation of removal. *Ibid.*; see 8 U.S.C. 1229c(d)(1)(B); 8 C.F.R. 1240.26(a). Petitioner has not voluntarily departed the United States.

3. Almost two years later, petitioner moved to reopen his case. Pet. App. 10a-18a. He alleged that his former attorney had provided ineffective assistance of counsel in preparing and presenting his application for cancellation of removal and in keeping him apprized of the status of his case. *Id.* at 10a.

The Board denied the motion to reopen. Pet. App. 8a-9a. The Board observed that "[t]he motion was not filed within the statutory and regulatory 90-day time limit for filing a motion to reopen." *Id.* at 8a (citing 8 U.S.C. 1229a(c)(7)(C)(i) and 8 C.F.R. 1003.2(c)(2)). The Board acknowledged that the 90-day deadline could be equitably tolled, but stated that petitioner "has not argued that his case warrants equitable tolling" and that he has failed to provide "sufficient facts for [the Board] to properly consider the issue." *Id.* at 9a. The Board reviewed petitioner's allegations regarding ineffective

assistance of counsel and determined that, "[b]ased on these sketchy factual allegations it is impossible to determine whether [petitioner] diligently followed his case with [his prior attorney] while his appeal was pending or his reasons for waiting until February 2007[] to investigate the status of his case." *Ibid.* The Board therefore denied the motion to reopen "as untimely filed" without "reach[ing] the substantive allegations raised therein." *Ibid.*

Petitioner then filed a motion for reconsideration of the Board's denial of his motion to reopen, which the Board denied. Pet. App. 6a-7a. The Board found no error in its prior decision. *Id.* at 6a. It also held that, because petitioner proffered new evidence in his motion to reconsider, that motion should be treated as a second motion to reopen, and such a motion is numerically barred by the INA and the relevant regulations. *Id.* at 7a.

4. The court of appeals dismissed petitioner's petition for review in an unpublished, per curiam opinion. Pet. App. 3a-5a. Citing its prior decision in *Kucana* v. *Mukasey*, 533 F.3d 534 (7th Cir. 2008), cert. granted, No. 08-911 (Apr. 27, 2009), the court of appeals held that 8 U.S.C. 1252(a)(2)(B)(ii) precluded judicial review of the Board's denial of petitioner's motions to reopen and reconsider. Pet. App. 4a. The court explained that, under Section 1252(a)(2)(B)(ii), "discretionary decisions by immigration authorities are immune from judicial review unless they raise 'constitutional claims or questions of law.'" *Ibid.* (quoting 8 U.S.C. 1252(a)(2)(D)). The court then determined that petitioner did not raise any constitutional claim or question of law that would be reviewable under 8 U.S.C. 1252(a)(2)(D). Pet. App. 4a-5a.

DISCUSSION

Petitioner seeks review (Pet. 18-20) of the court of appeals' determination that 8 U.S.C. 1252(a)(2)(B)(ii) precluded it from reviewing the Board's denial of his motion to reopen immigration proceedings. On April 27, 2009, this Court granted certiorari in *Kucana* v. *Holder*, No. 08-911, to decide whether Section 1252(a)(2)(B)(ii) precludes judicial review of the Board's denial of a motion to reopen immigration proceedings. Because this case presents the same question as *Kucana*, the Court should hold the petition pending the Court's decision in *Kucana*, and then dispose of it accordingly.*

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* Petitioner also argues (Pet. 21) that the court of appeals erred in holding that his petition for review did not raise any constitutional claim or question of law that would be reviewable under 8 U.S.C. 1252(a)(2)(D). That issue does not warrant this Court's review. Because *Kucana* concerns the threshold question whether Section 1252(a)(2)(B)(ii) deprives the courts of jurisdiction to review denials of motions to reopen, the Court should hold this petition for *Kucana*, rather than assume that Section 1252(a)(2)(B)(ii) precludes judicial review and then reach out to decide whether Section 1252(a)(2)(D) restores jurisdiction over petitioner's claims. Moreover, petitioner has not identified any pressing need for this Court's review of the Section 1252(a)(2)(D) issue. He does not contend that there is any disagreement in the circuits regarding whether the types of claims he raised contain reviewable constitutional claims or questions of law. Indeed, he provides only a conclusory, three-sentence argument on this issue, which may not even be sufficient to preserve the issue in this Court.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Kucana* v. *Holder*, No. 08-911, and then disposed of in accordance with the Court's decision in that case.

Respectfully submitted.

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